STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

THE HONORABLE PETER D. O'CONNELL PRESIDING

JOAN M. GLASS,

Plaintiff-Appellant,

v

RICHARD A. and
KATHLEEN D. GOECKEL,

Defendants-Appellees.
_____/

BRIEF ON APPEAL - APPELLEES

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

PAGE(S)

TABLE OF CONTENTS
(Continued)

PAGE(S)

INDEX OF AUTHORITIES

CASE(S) **PAGE(S)**

INDEX OF AUTHORITIES
(Continued)

CASE(S) **PAGE(S)**

INDEX OF AUTHORITIES
(Continued)

CASE(S) **PAGE(S)**

COURT RULES

STATUTE(S)

MISCELLANEOUS

BASIS OF APPELLATE JURISDICTION

Plaintiff-Appellant's jurisdictional statement is correct.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. DOES THE PUBLIC TRUST DOCTRINE OPERATE TO DEPRIVE THE APPELLEES OF THE RIGHT TO EXCLUSIVE USE OF THEIR LAND TO THE WATER'S EDGE?

THE TRIAL COURT DID NOT ADDRESS THIS ISSUE.

THE PLAINTIFF-APPELLANT ANSWERS "YES".

THE DEFENDANTS-APPELLEES ANSWER "NO".

THE COURT OF APPEALS ANSWERED "NO".

II. DOES THE GREAT LAKES SUBMERGED LANDS ACT DEPRIVE THE APPELLEES OF THE RIGHT TO EXCLUSIVE USE OF THEIR PROPERTY TO THE WATER'S EDGE?

THE TRIAL COURT ANSWERED "YES".

THE PLAINTIFF-APPELLANT ANSWERS "YES".

THE DEFENDANTS-APPELLEES ANSWER "NO".

THE COURT OF APPEALS ANSWERED "NO".

III. HAS PLAINTIFF ACQUIRED AN EASEMENT BY A PRESCRIPTION, CUSTOM, OR BY VIRTUE OF STATEMENTS MADE BY MR. GOECKEL OVER THE PROPERTY IN QUESTION?

THE TRIAL COURT DID NOT ADDRESS THIS ISSUE.

THE PLAINTIFF-APPELLANT ANSWERS "YES".

THE DEFENDANTS-APPELLEES ANSWER "NO".

THE COURT OF APPEALS DID NOT ADDRESS THIS ISSUE BECAUSE THE PLAINTIFF DID NOT RAISE IT IN THE COURT OF APPEALS AS A SEPARATE AND INDEPENDENT BASIS UPON WHICH TO AFFIRM THE TRIAL COURT.

COUNTER-STATEMENT OF QUESTIONS INVOLVED
(Continued)

IV. IN ADDITION TO ENJOYING EXCLUSIVE USE OF THE PROPERTY IN QUESTION TO THE WATER'S EDGE, DO THE GOECKELS ALSO HOLD TITLE TO THE WATER'S EDGE?

THE TRIAL COURT DID NOT ADDRESS THIS ISSUE.

THE PLAINTIFF-APPELLANT ANSWERS "NO".

THE DEFENDANTS-APPELLEES ANSWER "YES".

THE COURT OF APPEALS ANSWERED "NO".

INTRODUCTION AND SUMMARY OF ARGUMENT

The issue in this case involves riparian rights to beachfront property that is created when the waters of the Great Lakes, in this case Lake Huron, recede. It is the Plaintiff's theory that when additional beachfront property is created by receding waters, that beach is public property extending from the "new" water's edge to the ordinary high watermark of the private beachfront property. The Court of Appeals held, however, consistent with over 160 years of Michigan precedent, (briefly interrupted for seven years by the aberrant Kavanaugh cases), that a private beachfront property owner on the Great Lakes, as the riparian owner, enjoys exclusive right to the use of the beachfront property to the water's edge, wherever that edge may be from time to time. This concept is known as the moveable freehold doctrine, a rule adopted in virtually every Great Lakes state. Indeed, it is revealing that, in a calculated attempt at obfuscation, this doctrine is only obliquely referenced three times in Plaintiff's fifty page brief. The moveable freehold doctrine became the law of the State of Michigan, bringing it in line with other states, in 1930 in the case of Hilt v Weber, 252 Mich 198 (1930). In Hilt the Michigan Supreme Court overruled two aberrant cases known as the "Kavanaugh Cases", and declared that a riparian owner's exclusive rights extend to the water's edge, wherever that may be from time to time:

> The most ordinary effect of a large body of water is to change the shoreline by deposits or erosion gradually and imperceptibly. **In such cases it is the general, possibly universal, rule,** except for the Kavanaugh Cases, and except in a few states where riparian rights have been extinguished by constitution or statute, **that the title of the riparian owner follows the shoreline under what has been graphically called "moveable freehold."**

Id. at 219 (emphasis added.)

This has been the law in the State of Michigan since Hilt, (and, indeed, also before the Kavanaugh cases), and contrary to Plaintiff's panicked outcry, the sky has neither fallen, nor has the

Court of Appeals announced a new rule of law in this case. The well-settled nature of Michigan law on this issue is perhaps best evidenced by the plethora of cases cited by the Court of Appeals that, the Appellees might add, is certainly by no means exclusive:

> As the foregoing demonstrates, the *Hilt* Court placed Michigan riparian law, as it pertains to navigable waters, back in conformity with the common law as it existed in Michigan before the *Kavanaugh* cases. Courts since then have recognized that under *Hilt*, a riparian owner has exclusive use of the dry land to the waters' edge, and loses the exclusive right to use that same dry land when it becomes submerged by the rising waters. See, e.g., *Peterman v Dept of Natural Resources*, 446 Mich 177, 192-193; 521 NW2d 499 (1994) (quoting *Hilt*, the Supreme Court stated that it "has long held" that "'the right to acquisitions to land, through accession or reliction, is itself one of the riparian rights.' *Hilt*, *supra* at 218. Hence, the 'title of the riparian owners follows the shoreline under what has been graphically called 'a moveable freehold.'"); *Bott v Comm of Natural Resources*, 415 Mich 45, 82-84; 327 NW2d 838 (1982) ("In *Hilt*, a recent holding in the *Kavanaugh Cases* that owners adjacent to the Great Lakes hold title to land running along the meander line but not to the waters' edge was re-examined and overruled."); *Klais v Danowski*, 373 Mich 262, 279; 129 NW2d 414 (1964) (recognizing under *Hilt* that a riparian owner has use of the land to the waters' edge, including any new land occurring through accretions or reliction); *Donohue v Russell*, 264 Mich 217, 218; 249 NW 830 (1933) (recognizing that *Hilt* "held that the riparian owner owns the land beyond the meander line to the edge of the water."); *Boekeloo v Kuschinski*, 117 Mich App 619, 626-627; 324 NW2d 104 (1982); *Turner Subdivision Prop Owners Ass'n v Schneider*, 4 Mich App 388, 391; 144 NW2d 848 (1966) ("*Hilt* established that a riparian owner owns land between the meander line and the water."); *Nordale v Waxberg*, 84 F Supp 1004, 1006 (D Alas, 1949) (recognizing that in *Hilt*, "it was held that the boundary line of riparian owners along the Great Lakes is the waters' edge, and not the meander line. The riparian owner has the right to accretion.")

App, 16a, 17a..[1]

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[1]This overwhelming number of cases cited by the Court of Appeals below renders utterly erroneous Plaintiff's claim that reversing the Court of Appeals in this case would not entail overruling any of this Court's decisions. It also directly refutes Plaintiff's claim that, since Hilt, there has been "confusion for the Courts".

In misplacing its reliance on cases discussing the public trust doctrine, the Plaintiff distorts unmercifully the holdings in those cases, which make it clear that the public trust doctrine is concerned with submerged land, and the State's interest in maintaining title to navigable waters for the benefit of the public in general.

Plaintiff's reliance on the Great Lakes **Submerged** Land Act (emphasis added) is equally misplaced, as the Act on its face deals with submerged land, and specifically states that it is not intended to affect "rights acquired by accretions occurring through natural means or reliction." MCL 324.32502.

The folly of Plaintiff's theory is best exemplified by the undeniable and illogical effect it would have on private beachfront property owners. Every time the water recedes and a new strip of beach is created, the riparian private beachfront property owner loses exclusive enjoyment to the water's edge, a new **public** beach having now been created between the high water mark and the water's edge. Imagine the riparian owner's consternation when, upon the creation of this "public" beach, up fly the jetskis, up go the volleyball nets, up go the tents, in goes a firepit, and a boomboxes blare for good measure. The **private** character of the beachfront property for which people like the Appellees pay top dollar will have been utterly destroyed. That makes no sense, yet it is the undeniable effect of what the Plaintiff urges.

As cogently observed by Amicus, Tip of the Mitt Watershed Council, Plaintiff does not, and cannot, cite any case from a Great Lakes state in support of her alleged right of access to the land in question. This, of course, should come as no surprise as the rule of law Appellant urges is neither supported by the public policy, nor safe from valid constitutional attack.

STATEMENT OF FACTS

The Plaintiff-Appellant, Joan M. Glass ("Plaintiff"), owns non-riparian property in Alcona County. The Defendants-Appellees, Richard A. Goeckel and Kathleen D. Goeckel ("the Goeckels"), own lakefront property on Lake Huron, across highway U.S. 23 from Plaintiff's property. Plaintiff's 1967 deed includes an express "easement for ingress and egress to Lake Huron over the North fifteen (15) feet" of the Goeckels' property. App, 3a.

On May 10, 2001, Plaintiff filed a Complaint in the Circuit Court for Alcona County against the Goeckels alleging that the Goeckels were interfering with and obstructing Plaintiff's access to the easement and that Plaintiff had a prescriptive easement which allowed her to use the beach portion of the easement for beach activities such as sunbathing and lounging. The Goeckels denied any such prescriptive easement rights in their Answer and Counter-Claim for trespass. App, 21a. Thereafter, Plaintiff filed a First Amended Complaint claiming that the Goeckels were also interfering with Plaintiff's alleged right to walk along the shore of Lake Huron lying below and lakeward of the ordinary high-water mark. App, 23a..

The Goeckels filed a Motion for Summary Disposition and in response, Plaintiff argued that she was entitled to summary disposition pursuant to MCR 2.116(I)(2). App, 28.. In addition to issues related to the scope of the easement, Plaintiff alleged the right to use Defendants' private property below and lakeward of the ordinary high-water mark as set forth in Count 3 of her First Amended Complaint. App, 26a.

On April 3, 2002, the Court issued an Opinion finding that the Plaintiff has a right to use the Goeckels' private property lying below and lakeward of the natural ordinary high-water mark for pedestrian travel. App, 4a. The Court purported to observe that there was "no clear precedent" regarding this issue, and based its ruling on the Great Lakes Submerged Land Act:

> The second issue is whether Plaintiff is allowed to use beach area for pedestrian travel lakeward of the high water mark. The Court has reviewed both arguments concerning this matter and is of the Opinion that there is no clear precedent here. However, it appears to this Court that Plaintiff has the better argument and the Court therefore rules in Plaintiff's favor. The Great Lakes Submerged Land Act, MCL §324.32501 et seq, does provide for a specific definition of the high water mark of Lake Huron and does seem to support the argument that the Plaintiffs have the right to use the shore of Lake Huron lying below and lakewards of the natural ordinary high water mark for pedestrian travel.

App, 4a. Thereafter, the Court entered an Order conforming to its April 3, 2002 Opinion. App, 5a.

An Order Establishing Easement Rights was entered on June 25, 2002. App, 7a. The June 25, 2002 Order was a final order and, thereafter, the Goeckels perfected an appeal as of right to the Court of Appeals.

The Court of Appeals reversed the Circuit Court, finding that the moveable freehold doctrine gave the Goeckels exclusive right to the use of their beachfront property to the water's edge, wherever the water's edge might be from time to time. App 12a-18a. The Court rejected Plaintiff's claim that the Great Lakes Submerged Land Act infringed on the Goeckel's riparian rights under the moveable freehold doctrine, noting that the Act specifically indicated that it does not affect rights acquired by accretions occurring through natural means or reliction. App, 18a, 19a.

Although the Court of Appeals held that the Goeckels had exclusive right to the use of their property to the water's edge, it also held that title to the land between the ordinary high water mark and the water's edge remained with the State pursuant to the Public Trust Doctrine. App, 16a.

The Plaintiff applied for leave to this Court. Additionally, numerous amicus curiae briefs were accepted by this Court during the pendency of Plaintiff's application. Amici, Michigan Chamber of Commerce, National Federal of Independent Business Legal Foundation, Michigan Banker's Association, Michigan Hotel, Motel and Resort Association, Save Our Shoreline, Great

Lakes Coalition, Inc., and Defenders of Property Rights all urged a reversal of that portion of the Opinion of the Court of Appeals that held title to the land in question remained with the State. On October 28, 2004 this Court granted leave. Thereafter, the Goeckels filed a motion requesting that this Court consider the title issue raised by the various amici. On November 19, 2004 this Court granted the Goeckels' motion confirming ". . . that the issue of title to previously submerged land will be heard by this Court and should be briefed by the parties. . .".

The Goeckels now offer this brief on appeal. It is the position of the Goeckels that the Court of Appeals correctly held they were entitled to exclusive use of the land to the water's edge. The Goeckels are also in agreement with the above-referenced amici that, in addition to exclusive right to use, title to the land in question is held by the Goeckels, not the State.

STANDARD OF REVIEW

This Court reviews a Trial Court's decision on a summary disposition motion de novo as a question of law. LaRose Market, Inc v Sylvan Ctr, Inc, 209 Mich App 201, 204 (1995).

ARGUMENT

I. THE PUBLIC TRUST DOCTRINE DOES NOT DEPRIVE A PRIVATE BEACHFRONT PROPERTY OWNER ON THE GREAT LAKES OF EXCLUSIVE USE OF BEACHFRONT PROPERTY TO THE WATER'S EDGE, WHEREVER THAT EDGE MAY BE FROM TIME TO TIME.

A. Prior to the "Kavanaugh Cases", Private Beachfront Property Owners on the Great Lakes Enjoyed Exclusive Use of Their Property to the Water's Edge.

The first case that suggested that State ownership within this context is limited to submerged lands is the 1843 case of LaPlaisance Bay Harbor Co v Monroe, 1 Walk. 155 (1843):

> So, with regard to our Great Lakes, where such parts of them as lie within the limits of the state; the proprietor of the adjacent shore has no property whatever in the **land covered by the water of the lake**.

(emphasis added.)

The next case that is instructive came approximately forty years later when this Court decided Lincoln v Davis, 53 Mich 375 (1884). There the Court held that the riparian owner's rights did not extend into the water so as to allow the owner to remove fishing nets from the water. Although the majority and concurring opinions differed on some points, as Amicus Save our Shoreline points out, on one point the Court was unanimous: The State's title would not extend upland of the low watermark. This is established by the majority's observation that there is ". . . no such proprietary division known on these waters as high or low watermark", and the concurring opinion's observation that the State's title ends at the ". . . low instead of at high watermark." Id. at 385, 389, 390.

Next came the case of People v Silberwood, 110 Mich 103 (1896), which held that the legislature had the authority to pass a statute prohibiting the destruction of submarine vegetation on **submerged** lands. The Court noted, with approval, that decisions from New York, Pennsylvania, and Ohio ". . . all hold that the fee of the riparian owner ceases at the low-water mark." Id. at 107.

The Court also cited as authority United States Supreme Court's decision in Illinois Central R Co v State of Illinois, 146 US 387 (1892). Contrary to Plaintiff's claim, Illinois Central lends **no** support for her claim on appeal here.

Appellees take no exception to Professor Joseph Sax's observation that Illinois Central is the "lodestar" in American Public Trust Law. Joseph Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich L Rev 473, 489 (1970). One will search in vain, however, for even a tiny hint or implication, let alone an actual passage, from the majority opinion in that case that supports Plaintiff's claim here. **All** of the land the Supreme Court held the State of Illinois could not convey was submerged. Indeed, the Court drew a distinction between the riparian rights the railroad had to wharf out and the State's inability to divest itself of submerged lands. Illinois Central R Co, 146 US at 463, 464.

Only two years after Silberwood this Court was presented with the case of People v Warner, 116 Mich App 228 (1898). At issue was ownership of a marshy island once submerged, but exposed at the time of the dispute. Warner claimed ownership as an accretion to an island he owned. The State claimed title, the island said to have been an accretion to other islands the State owned. This Court reversed the trial court's directed verdict in favor of the State, finding a question of fact existing regarding whether the land in question "gradually extended" from a point on Warner's land, or whether the land arose from the water and was later then connected to Warner's island during times of low water. The Court observed:

> So, if, by the imperceptible accumulation of soil upon the shore of an island belonging to a grantee of the government, or by reliction, it should be enlarged, such person, and not the state, would be the owner; . . . .

Id. at 239.[2]

Next, in 1901 came the case of State v Lake St Clair Fishing & Shooting Club, 127 Mich 580 (1901). Plaintiff's reliance on this case is misplaced. This is established by examining Justice Hooker's concurrence in Lake St Clair Fishing & Shooting Club with his majority opinion in Warner. While it is true, as Plaintiff quotes a part of Justice Hooker's concurrence in Lake St Clair Fishing & Shooting Club, 127 Mich at 586 (emphasis added), on page 16 of her brief that he referred to public rights extending to the "high-water mark **in all tide waters**", one must also remember Justice Hooker's observation in Warner, 116 Mich at 239 that, in the Great Lakes, the tides "have a trifling affect if they can be said to exist." Additionally, Lake St Clair Fishing & Shooting Club was not a boundary case; it merely held that "title to submerged lands in the Great Lakes, held by the State, cannot be devested by adverse possession." Id. at 600 (Hooker, J., concurring). Other passages in Justice Hooker's concurrence in Lake St Clair Fishing & Shooting Club confirm that it in no way supports the rule of law urged by Plaintiff in this case:

> It never claimed or attempted to sell the land between such meander lines and the shore line, and it is the settled law of this State that the purchaser of the abutting land takes title to the shore line, regardless of the meander line . . . once a body of water is navigable, its character as navigable water extends to [the] low-watermark.
>
> * * *
>
> Under the cases of People v Silberwood, 110 Mich 103, 67 N.W. 1087, 32 L.R.A. 694, and People v Warner, supra, it must be taken as settled law that all land submerged, when the water in the lakes stands at low-water mark, is a part of the lake, and the title in the State, and all land between low-water mark and the meander line belongs to the

[2]As Save Our Shoreline accurately points out on page 15 of its brief, the Court's reference to high watermarks and low watermarks was only within the context of the absence of tides. Warner clearly constituted authority for the Hilt Court's ultimate adoption of the water's edge principle as Hilt itself noted on page 223 of its opinion.

> abutting proprietor, holding under an ordinary patent from the Federal Government or State.

Id. at 587, 590.

The first hiccup in what had become settled law involved the Court's regrettable choice of words in Ainsworth v Munoskong Hunting & Fishing Club, 159 Mich 61 (1909). In rejecting the riparian owner's claim that he could interfere with hunters in the waters of Munoskong Bay, the Court proclaimed:

> It is the established law of this State that riparian owners along the Great Lakes own only to the meander line, and that title outside this meander line subject to the rights of navigation, is held in trust by the State for the use of its citizens.

Id. at 64. This unfortunate insertion of meander line language stemmed from the fact that in Ainsworth the meander line and the waterline were the same. Hilt, 252 Mich at 207. Indeed, the bill in Ainsworth conceded that the Defendant owned to the water's edge. Id. As such, Ainsworth's meander line terminology was, although unfortunate, pure dictum and it was specifically overruled as such in Hilt. Id. at 227.

Next, before Ainsworth was overruled, came the case of State v Venice of America Land Co, 160 Mich 680 (1910). The issue in that case involved title to part of an island that became submerged from time to time, including at the time of statehood. Significantly, it is unclear from the opinion whether defendant owned the land as a riparian owner of land further upland, but it is clear defendant claimed he owned the land as a result of a grant from the British government. The Court affirmed the lower Court's ruling that defendants' predecessor never had title to the land, and thus neither did the defendant. Id. at 691-692. Plaintiff's reliance upon this case for the proposition that the State holds title to all land below the high watermark is also misplaced. As the Hilt Court

observed: "No question was raised of reliction, riparian rights, or change of conditions as affecting title" in Venice of America Land Co.[3]

In 1923 Michigan law took a misguided u-turn. Relying upon the aforementioned dictum in Ainsworth, supra, this Court held in Kavanaugh v Rabior, 222 Mich 68 (1923), that the fee in all land between the meander line and the water's edge is held by the State in trust, subject to riparian rights of the upland owner. Five years later this unsupportable holding was reaffirmed in 1928 in Kavanaugh v Baird, 241 Mich 240 (1928).[4]

Professor Theodore Steinberg aptly described the impact of the Kavanaugh cases:

> The Kavanaugh cases, as they would come to be known, were a dark chapter indeed for those wedded to private property.

Theodore Steinberg, God's Terminus: Boundaries, Nature, and Property on the Michigan Shore, 37 American Journal of Legal History, 65, 70 (1993).[5]

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[3]It is also noteworthy that the Venice of America majority referred approvingly to Justice Hooker's concurring opinion in St. Clair Fishing which clearly expressed the view of private ownership to the low watermark. Venice of America Land Co, 100 Mich at 702.

[4]In between the two Kavanaugh cases the Court decided Nedtweg v Wallace, 237 Mich 14 (1926). Contrary to the Plaintiff's claim, Nedtweg provides absolutely no support for the rule of law she urges on appeal here. That case merely held that the State had the power to lease land to private individuals that had been former lake bed bottom, but had become permanently relicted. In Nedtweg, no riparian owner made any claim to title or the exclusive right to use the land in question.

[5]Professor Steinberg also correctly observed that, prior to the Kavanaugh cases, Michigan law held that riparian owners took title to the water's edge:

> Before the Kavanaugh case, property owners along Michigan's shores believed that they owned to the water's edge.

Id. at 72.

B. Hilt v Weber, Overruled the Kavanaugh Cases, Thus Reinstating the Water's Edge as the Point to Which Riparian Owners Enjoy Exclusive Use.

Order was restored to Michigan law by this Court in its 1930 decision in Hilt.

In Hilt, this Court adopted the "movable freehold" doctrine by holding that a riparian owner has exclusive use of the beachfront to the water's edge as it exists from time to time. In so doing, the Court overruled the Kavanaugh cases. See Hilt, 252 Mich at 227. The Hilt Court explained that in adopting the "movable freehold", it was returning to the law prior to the Kavanaugh cases:

> Prior to the *Kavanaugh Cases* there appears to have been little or no conflict of law upon the effect of reliction on title. The law of the sea applies to the Great Lakes. All maritime nations, recognizing the vagaries of the sea, beyond human control and anticipation, have evolved systems of law, founded upon rational conceptions of common justice, to adjust and compensate its effects. The most ordinary effect of a large body of water is to change the shore line by deposits or erosion gradually and imperceptibly. In such cases **it is the general, possibly universal, rule**, except for the *Kavanaugh Cases*, and except in a few states where riparian rights have been extinguished by constitution or statute, **that the title of the riparian owner follows the shore line under what has been graphically called "a movable freehold**."

Id. at 219 (citations omitted, emphasis added.)

The Hilt Court explained the sound rationale behind adoption of the moveable freehold doctrine:

> The basis of the riparian doctrine, and an indispensable requisite to it, is actual contact of the land with the water.
>
> * * *
>
> 'The reason ordinarily given for the rule is that it is necessary to preserve the riparian owner's right of access. Other reasons sometimes are that it is within the maxim, De minimis non curat lex, or that since the riparian owner may lose soil by the action of the water he should have the benefit of any land gained by the same action.

Id. at 218; 219-220 (quoting 45 CJ p 525.)

Quoting Town of Orange v Regnick, 94 Conn 573, 578 (1920), the Hilt Court explained that the public trust doctrine is a decidedly narrow one designed to protect the public's right to navigate on navigable waters:

> The only substantial paramount right is the right to the free and unobstructed use of navigable waters for navigation.

Id. at 226.

In Argument I 3A, Plaintiff attempts to distort the clearly enunciated adoption of the moveable freehold doctrine in Hilt by arguing that the doctrine is limited to a rule of accretion and reliction resulting in **permanent** changes. This is unsupportable. The only thing that mattered to the Hilt Court was that title would "follow" the water's edge, wherever the laws of nature had placed it regardless of the specific cause:

> Nor are we concerned with the specific cause of reliction or accession so it be gradual, imperceptible, and natural or general to the lake.
>
> * * *
>
> The boundary was where nature had placed it - - at the water's edge.

Id. at 201, 212.[6]

Appellee would also add that, in its opinion below, the Court of Appeals recognized that the moveable freehold doctrine was not limited to cases of permanent accretion or reliction. App, 12a, fn 2.

In Section I 3B Plaintiff engages in an unfathomable exercise of linguistic gymnastics in an attempt to not merely distort, but contort, the Hilt decision. Here, Plaintiff argues with an apparently

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[6]See also, Section I C of the Save Our Shoreline brief for an excellent discussion of the futile nature of Plaintiff's attempt to so limit Hilt.

straight face, that when the Hilt Court said "water's edge" it really meant to say "ordinary high watermark." Such a claim would be humorous if the stakes weren't so high.

In support of her claim in this regard Plaintiff cites to numerous cases from other jurisdictions that, she claims, used the terms ordinary high watermark and water's edge synonymously. Plaintiff's efforts in this regard fail for several reasons. First, and most notably, not **one** of the cases cited by Plaintiff for this proposition involved application, or even mention, of the "moveable freehold doctrine". The notion that the "water's **edge**" is a phrase synonymous with the "**ordinary** high water **mark**" within the context of the Hilt Court's adoption of the "**movable** freehold doctrine" would render the word "movable" meaningless, not to mention the words "ordinary" and "mark".

Second, Appellees would emphasize that the issue presented by this case is left to each State, as each State sees fit. Shively v Bowlby, 152 US 1 (1894). The out-of-state cases cited by Appellant are therefore inapposite.

Lastly, the cases from other jurisdictions, given their context, don't necessarily stand for the proposition that the ordinary high water mark and the water's edge are synonymous. For example, Plaintiff's citation to Oregon v Corvalis Sand & Gravel, 429 US 363 (1977) is a citation to the dissenting opinion. Plaintiff's citation to Hogg v Beerman, 41 Ohio St 81, 91 (1884) does not even come from the opinion, but from a summary of the argument of counsel. In Wilt v Endocott, 68 Or App 481 (1984) the Court reported that under Oregon law title extends to the water's edge, and under that rule the words "to the bank" have been construed as conveying only to the high water mark. Id. at 485. Unfortunately for the Court in Wilt, the case they cite for the water's edge proposition, Micelli v Andrus, 61 Or 78 (1912) did not adopt the water's edge rule, but rather the ordinary high water mark. Id. at 83-84. A correct observation of Oregon law is, simply, that a conveyance "to the bank" of a river is construed as conveying only to the high water mark. Richards v Page Inv Co, 112

Or 507 (1924). Plaintiff's reference to State v Hardee, 259 SC 535 (1972) is also misleading as the term, "to the water's edge, or the high water mark" necessarily carries with it the implication, given the context within which it was made, that it was "to the water's edge, or the high water mark", whichever is higher because the public trust doctrine applies to **submerged** lands. And the Court's use of "water's edge or high water mark" in Wright v Day, 33 Wis 260 (1873) is best construed as not treating the terms synonymously, but under the law of any given State, one serves as a limitation upon the other depending on the facts of the case. Plaintiff's citation to the United States Supreme Court decision in Hardin v Jordan, 140 US 371 (1891) is also a stretch. If the Court examines in its entirety the passage Plaintiff cites in broken fashion, it is not at all clear that the Court treated the terms synonymously.[7] In any event, this passage is clearly gratuitous dictum as the issue in that case was whether plaintiff held title to the low water mark or to the center of an inland lake. The Court held the riparian owner took title to the center of the lake. Hardin, 140 US at 401. Appellees also respectfully refer this Court to Argument I A6 of the amici brief of the Michigan Chamber of Commerce, et al.

The only two Michigan cases Plaintiff cites in support of her remarkable proposition that the ordinary high water mark and the water's edge are synonymous under Michigan law are McKnight v Broedell, 212 F Supp 45 (ED Mich 1962), and People ex rel Gazlay v Murray, 54 Mich App 685 (1974). Neither case stands for the proposition Plaintiff urges. In McKnight v Broedell, the Federal District Court for the Eastern District of Michigan merely held that, in that Court's view, Michigan

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[7]The undersigned is compelled to observe that Hardin and many of the other cases referenced in the various briefs were decided in the 19th century, when the art of expression via written word differed markedly, and was far less precise, than in the 20th, and now the 21st century. Whatever frailties that existed in the early stages of American jurisprudence regarding the ability of our learned and dedicated justices to communicate clearly via written opinion, they ought not be used to distort what this Court **clearly** said in Hilt nearly a half century or more later.

law was not clear on the issue of boundary and so a reasonable doubt about title existed in that case. Id. at 51, 52.[8]

People ex rel Gazlay v Murray, supra, was an action instituted by the Department of Natural Resources to enjoin the defendant from filling a parcel of **submerged** land. Id. at 686. The land at issue had "always been submerged beneath navigable water", and also happened to be below the high-water mark. Id. at 687. Because the land had always been submerged, the high water mark was rendered irrelevant, and the Court relied upon Hilt's adoption of the water's edge boundary. Id. at 687, 689.

Plaintiff's claim that the Hilt Court treated the water's edge and the high water mark synonymously is both illogical and unsupportable.

C. Michigan Cases After Hilt Have Consistently Reaffirmed the Water's Edge Principle.

The moveable freehold doctrine and the water's edge principle of Hilt is now firmly imbedded in Michigan law. After Hilt, this Court on its own motion granted Mr. Kavanaugh rehearing, granting him rights to the land in question pursuant to Hilt. Kavanaugh v Baird, 253 Mich 631 (1931). Similarly, rehearing gave Appellant rights to the water's edge pursuant to Hilt in Staub v Tripp, 253 Mich 633 (1931).

In Donohue v Russell, 264 Mich 217 (1933), Hilt was applied retroactively so as to allow judgment for a plaintiff-landlord who had not received payment from the tenant for rented land between the meander line and the water's edge during the seven years that had lapsed between the

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[8]Given this Court's decision in People v Broedell, 365 Mich 201 (1961), discussed infra, Appellees assert that McKnight v Brodell was wrongly decided.

first Kavanaugh decision and the decision in Hilt. In 1961, this Court in People v Broedell, 365 Mich 201 (1961) stated that "[i]n holding to the theory that the State holds certain submerged lands in trust for public navigation, fishing, hunting, etc., this Court has referred to the low water mark as the boundary thereof." Id. at 205-206. Importantly, the Court also noted that the plaintiff in Broedell, the State of Michigan:

> says that in administering the submerged lands acts, . . . it follows the 'philosophy' which it says is found in Hilt v Weber, 252 Mich 198, 233 NW 159, 71 A.L.R. 1238, of 'a moveable freehold', that is to say, that the dividing line between the State's and the riparian owners' land follows the water's edge or shoreline **at whatever level it may happen to be from time to time**.

Id. at 206. (Emphasis added.)

In 1966 the Court of Appeals in Turner Subdivision Property Owners Ass'n v Schneider, 4 Mich App 388, 391 (1966) observed: "Hilt established that a riparian owner owns land between the meander line and the water." In Boekeloo v Kuschinski, 117 Mich App 619, 626-627 (1982) the Court of Appeals observed that Hilt held that the waters themselves constitute the real boundary.

As recently as 1994 the Hilt decision was followed by this Court in Peterman v Dep't of Natural Resources, 446 Mich 177 (1994). In Peterman, beachfront property owners sued the DNR for the destruction of their beach caused by the DNR's negligently installed boat launch in jetties. Citing Hilt, Peterman held that the State owed compensation to the riparian owner because it resulted in the loss of the beach below the ordinary high water mark. Id. at 200-202.

Not only do Hilt and the cases decided thereafter make it clear that the Goeckels enjoy the exclusive right to use their beachfront property to the water's edge, commentators have also recognized this to be the law in Michigan. In Professor Sax's aforementioned article, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich L Rev 473 (1990), which consists of over eighty pages, Professor Sax described the "scope" of the public trust doctrine:

> **It is clear that the historical scope of public trust law is quite narrow**. Its coverage includes, with some variation among the states, that aspect of the public domain **below the low-water mark** on the margin of the sea and the great lakes, the waters over those lands, and the waters within rivers and streams of any consequence.

Id. at 556. (emphasis added.)

D. Cases from Other Great Lakes States Overwhelmingly Favor the Water's Edge Principle.

Plaintiff's claim that Hilt is an aberration and at odds with the law of other Great Lakes states is, to put it diplomatically, incorrect.

In Ohio riparian owners own to the ordinary low water mark of the Great Lakes. Sloan v Biemiller, 34 Ohio St 492 (1878).

In New York title to the lands above the low water mark belong to the owners of the private property along the shore of the Great Lakes. Stewart v Turney, 237 NY 117 (1923).

In Pennsylvania the property owner takes title to the low water mark. Sprague v Nelson, 6 Pa D & C 493 (1924).

In Minnesota the property owners of land along a navigable lake have title to the water's edge, which includes the right to land exposed by the action of recession of water over time. Lampry v Metcalf, 52 Minn 181, 198 (1893).

In Illinois private property owners of land along Lake Michigan take title to the water's edge, including land exposed by natural accretions. Brundage v Knox, 279 Ill 450 (1970).

The only State where the question appears unsettled is Wisconsin. In 1938 the Supreme Court of Wisconsin in Jansky v City of Two Rivers, 227 Wis 228 (1938) held that landowners along

Lake Michigan are entitled to all land extending to the natural shoreline as it changes from time to time thereafter by accretions or recession.

However, in State v Trudeau, 139 Wis 2d 91 (1987) the Court ruled in favor of the State when it brought an action against a condominium project alleging that the project was an illegal construction on the bed of Lake Superior. Significantly, the project was built on stilt-like pilings and much of the land underlying the structure was covered with standing water. There generally was some water on the project site and/or some aquatic-type vegetation. The project site itself was not navigable. Id. at 98. Although there are undoubtedly discussion and observations in the case standing for the proposition that the State of Wisconsin owns to the ordinary high water mark, the Court also based its holding on the proposition that an area need not be navigable to be lake bed. Id. at 103-104. The Court made no mention of its earlier decision in Jansky.

It is clear that the overwhelming weight of the law in other Great Lakes states is in direct accord with the Hilt Court's water's edge proclamation.

E. Public Policy Considerations Support Adoption of the Water's Edge Principle, and Adoption of the Rule of Law Urged by Appellant Would be Constitutionally Infirm.

1. The Michigan Constitution of 1963 has Placed Management of the Public Trust Doctrine in the Hands of the Legislature.

Michigan adopted a new constitution in 1963. Article 4, §52 of it provides:

> The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety, and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.

Mich Const of 1963, art IV, §52. This provision was adopted in response to burgeoning growth in the State and a desire to delineate clearly the power to protect the environment by entrusting environmental policy to the Legislature. See 2 Official Record, Constitutional Convention 2602 (1961) (amendment intended to emphasize State police power to protect environment).

In Bott v Comm'n of Natural Resources, 415 Mich 45 (1982) this Court rejected a specific invitation to ignore stare decisis for the purpose of addressing current public issues. After noting the "rules of property law" established for over 60 years, riparian reliance, and resulting investment-backed expectations, the Bott Court soundly rejected the expansionist argument:

> The Legislature can, if it is thought to be sound public policy to enlarge public access to and the use of inland waters, pass laws providing for the enlargement of the rights of the public . . . and for the compensation of landowners affected by the enlarged servitude.

Id. at 62. Noting several important policy concerns, including the Court's "inability to compensate riparian owners for the loss of a valuable right," the Bott Court concluded:

> we believe that this Court is not an appropriate forum for resolving the competing societal values which underlie this controversy.

Id. at 86.[9]

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[9]Regardless of whether action from this Court, or the Legislature, any retreat from the water's edge proclamation in Hilt that would deprive beachfront property owners of land to which they had either title or exclusive right to use, and would therefore constitute an unconstitutional taking without just compensation under both State and Federal law. See Peterman, supra, brief of Amici curiae Michigan Chamber of Commerce, et al, Section III C, and brief of Defendants of Property Rights, Section II.

2. A Judicial Departure from the Hilt Principles Would be Contrary to the Doctrine of Stare Decisis as it Affects Well-Settled Property Rights, and Would be Contrary to Public Policy.

The relief sought by Appellant upsets the substantial reliance interests of riparian landowners induced by decades of stable precedent applying the public trust doctrine. Bott, 415 Mich at 62 ("Riparian and littoral land has been purchased" and improved "in reliance on" the limited extent of the public trust doctrine). The Bott Court compared the judicial expansion of the public trust to other "judicial 'takings' without compensation" that constituted "severe injustice." Id. at 84. Simply put, as recognized in Bott, it would be an unfair policy for the State to bait investors into investing and perhaps developing along the State's waters, and then switch concepts of property law after the State's desired result is achieved. "The 'rules of property' doctrine is a judicial rule of fairness . . ." Id. at 82.

Even the Hilt case, which involved the overruling of two recently decided Supreme Court cases, cautioned that changes in settled rules of property should be rare:

> The doctrine of stare decisis has been invoked. The point has much force. Titles should be secure and property rights stable. Because a judicial decision may apply to past as well as to future titles and conveyances, a change in a rule of property is to be avoided where fairly possible. But where it clearly appears that a decision, especially a recent one, was wrong and continuing injustice results from it, the duty of the court to correct the error is plain. The Kavanaugh Cases were decided in the recent years in 1923 and 1928, respectively. They enumerated principles at variance with settled authority in this State and elsewhere, under which real estate transactions long had been conducted and given legal effect by courts and citizens, and, themselves, disregarded the doctrine of stare decisis by overruling the Warner Case, decided in 1898. The rules they stated are not as old as the rules they abrogated. When to that are added the considerations that they operated to take the title of private persons to land and transfer it to the state, without just compensation, and the rules here announced do no more than return to the private owners the land

> which is theirs, the doctrine of stare decisis must give way to the duty to no longer perpetuate error and injustice.

Hilt, 252 Mich at 223.

Additionally, the water's edge rule announced in Hilt is a good one. Professor Steinberg, in his article, God's Terminus: Boundaries, Nature and Property on the Michigan Shore, 37 American Journal of Legal History 65 (1993), regarding boundaries on the Michigan shore, explained:

> Boundaries, wherever they are drawn, serve a number of different purposes in cultures founded on private property, not the least of which is their role in protecting against the vagaries of nature. The water's edge seemed to offer a flexible boundary for preventing the natural world from disordering property relations.
>
> * * *
>
> But with the important decision of *Hilt v Weber* in 1930, Michigan law reverted back to an older, and some would say safer, standard. Once again the water's edge became the ruling boundary along the shore.

Id. at 80, 83.

Steinberg proceeded to explain another virtue of the water's edge rule:

> But it also has much to do with the seeming naturalness of the water's edge. That point shines through in a brief case note published on the Hilt decision. The author hailed the outcome, claiming it showed the supreme court's willingness to reason ably in setting down the law. The case brought Michigan back into line with the 'general rule' in regard to relicted land. 'From a geological standpoint,' and this is the key point, 'this holding seems to be more satisfactory. It should lessen the litigation on this subject as the water's edge is certainly a visable [sic] and practical boundary.'[83]
>
> [83]"Cases Notes," *Detroit Law Review* 1 (1931):48.

Id. at 87.

Of course another virtue of the water's edge rule is its simplicity. One can see it. As Professor Steinberg observed:

> Its appeal as a boundary rested in part on simplicity itself. There were no markers necessary here, no stakes, posts, monuments or artificial contrivances of any sort - - just water washing against the land. It was a boundary not easily dismissed, at least not by those with the power to do so at the time. For that would have required an act of will, no less strong than the act of God that purportedly put the boundary there in the first place - - the will to set limits, to overturn the passion for private property.

Id. at 88.

Last, but certainly least, it is worthy of extreme emphasis that **there is absolutely no record evidence in this case that the general public suffers from a shortage of access to the shores of the Great Lakes**. And, even if there were, it would not serve to justify the adoption of the rule of law urged by the Appellant, as the Hilt Court recognized:

> With much vigor and some temperature, the loss to the State of financial and recreational benefit has been urged as a reason for sustaining the *Kavanaugh* doctrine. It is pointed out that public control of the lake shores is necessary to insure opportunity for pleasure and health of the citizens in vacation time, to work out the definite program to attract tourists begun by the State and promising financial gain to its residents, and to conserve natural advantages for coming generations. The movement is most laudable and its benefits most desirable. The State should provide proper parks and playgrounds and camping sites and other instrumentalities for its citizens to enjoy the benefits of nature. But to do this, the State has authority to land by gift, negotiation, or, if necessary, condemnation. There is no duty, power, or function of the State, whatever its claimed or real benefits, which will justify it in taking private property without compensation. **The State must be honest**.

Hilt, 252 Mich at 224. (Emphasis added.)

The water's edge or low water mark has been the rule in Michigan for over 160 years, save for the Kavanaugh interruption. Members of the general public have nevertheless enjoyed the occasional stroll along public beaches, and permissively, private beaches. But the key here is that access to private beaches must be permissive. The holding of the Court of Appeals in this case

presents none of the "grave" consequences urged by Appellant. The rule of law urged by the Appellant, however, does.

II. THE GREAT LAKES SUBMERGED LANDS ACT DOES NOT DEPRIVE THE APPELLEES OF THE EXCLUSIVE RIGHT TO USE THEIR PRIVATE BEACHFRONT PROPERTY TO THE WATER'S EDGE.

The Trial Court ruled and the Plaintiff argues that the Great Lakes Submerged Lands Act, MCL 324.32501 et seq, dictates the scope of the public trust doctrine in Michigan. They rely in particular on Section 2 of the Act which states:

> The lands covered and affected by this part are all of the unpatented lake bottomlands and unpatented made lands in the Great Lakes, including the bays and harbors of the Great Lakes, **belonging to the state or held in trust by it**, including those lands that have been artificially filled in. The waters covered and affected by this part are all of the waters of the Great Lakes within the boundaries of the state. This part shall be construed so as to preserve and protect the interests of the general public in the lands and waters described in this section, to provide for the sale, lease, exchange, or other disposition of unpatented lands and the private or public use of waters over patented and unpatented lands, and to permit the filling in of patented submerged lands whenever it is determined by the department that the private or public use of those lands and waters will not substantially affect the public use of those lands and waters for hunting, fishing, swimming, pleasure boating, or navigation or that the public trust in the state will not be impaired by those agreements for use, sales, lease, or other disposition. The word "land" or "lands" as used in this part refers to the aforesaid described unpatented lake bottomlands and unpatented made lands and patented lands in the Great Lakes and the bays and harbors of the great lakes lying below and lakeward of the natural ordinary high-water mark, but this part does not affect property rights secured by virtue of a swamp land grant or rights acquired by accretions occurring through natural means or reliction. For purposes of this part, the ordinary high-water mark shall be at the following elevations above sea level, international Great Lakes datum of 1955: Lake Superior, 601.5 feet; Lakes Michigan and Huron, 579.8 feet; Lake St. Clair, 574.7 feet; and Lake Erie, 571.6 feet.

MCL 324.32502. (emphasis added.)

The purpose of the Act is not to declare ownership interests or change rights determined at common law. There are three (3) purposes clearly stated in Section 2 of the Act:

> This part shall be construed so as [1] to preserve and protect the interests of the general public in the lands and waters described in this section, [2] to provide for the sale, lease, exchange, or other disposition of unpatented lands and the private or public use of waters over patented and unpatented lands, and [3] to permit the filling in of patented submerged lands whenever it is determined by the department that the private or public use of those lands and waters will not substantially affect the public use of those lands and waters for hunting, fishing, swimming, pleasure boating, or navigation or that the public trust in the state will not be impaired by those agreements for use, sales, lease, or other disposition.

MCL 324.32502.

More importantly, Section 2 is clear that the Act only applies to lands "belonging to the State or held in trust by it". Thus, rather than defining the scope of land subject to the public trust, the Act does not apply unless lands are owned by the State or held in trust by the State. See also, Obrecht v National Gypsum Co, 361 Mich 399, 407-08 (1960) (noting that the Great Lakes Submerged Lands Act of 1955 authorized the State to convey or lease the unpatented lake bottom lands and unpatented made lands in the great lakes "belonging to the State of Michigan or held in trust by it"); Oliphant v Frazho, 5 Mich App 319, 322 (1966), rev'd other grounds, 381 Mich 630 (1969) (explaining that the Great Lakes Submerged Lands Act "applies only to unpatented submerged lake bottom lands and unpatented made lands in the Great Lakes belonging to the State or held in trust by it"). As discussed above, the State does not own the land lakeward of the ordinary high-water mark and does not hold said property in trust. Therefore, the Act, by its own terms, does not apply.

The Act, by its terms, is also not to be construed as affecting rights "as may be acquired by accretions occurring through natural means or reliction." MCL 324.32502. An "accretion" can occur in two ways: (1) by the washing up of sand or soil, so as to form firm ground; or (2) by dereliction, as when the sea shrinks below the usual water-mark. See Black's Law Dictionary 20 (6th ed 1990). Reliction is similarly defined as an increase in the land by permanent withdrawal or

retrocession of the sea. See Black's Law Dictionary 1291 (6th ed 1990). As discussed above, riparian rights include the right to accretions. Hilt, 252 Mich at 225.

The public trust doctrine as set forth in Illinois Central and the Great Lakes Submerged Lands Act are "nearly identical" and are not inconsistent. Superior Public Rights, Inc v Dep't of Natural Resources, 80 Mich App 72, 85-86 (1977). The Great Lakes Submerged Lands Act defines the rights of the public to include use for "hunting, fishing, swimming, pleasure boating, or navigation". MCL 324.32502. Neither the public trust doctrine, nor the GLSLA secure the right to activity on the shore.

Nowhere does the Act, the case law interpreting the Act or the public trust doctrine as recognized by Michigan Courts grant the public the additional right to walk along the shore on private property. To the contrary, as discussed above, the cases and the Act limit the public's rights under the public trust doctrine to uses associated with activities on or in the water itself.[10]

In rejecting Plaintiff's GLSLA argument the Court of Appeals not only relied upon the argument set forth immediately above, indicating that the Act provides no substantive rights, but also observed that the statute addresses six particular matters, none of which involve shoreline activity. App, 19a. Nevertheless, Plaintiff boldly proclaims that this Court should take "judicial notice" to the contrary. Plaintiff, predictably, can cite no authority for the proposition that the judicial notice doctrine may be used to expand a statute's applicability beyond what it expressly

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[10]In her section regarding the public trust, Plaintiff misplaces reliance upon Idaho v Coeur d'Alene Tribe of Idaho, 521 US 261 (1997). With regard to the public trust doctrine, such reliance is misplaced because Idaho had specifically passed a statute with regard to the lake in question providing that the land between the ordinary high and low water mark belonged to the State and was declared to be devoted to public use. Id. at 287. The case is significant, however, with regard to Plaintiff's GLSLA argument. Had the Legislature intended to declare the land between the ordinary high water mark and the water's edge to be vested in the State, it could have easily and clearly done so in a manner similar to the Idaho statute. Instead, the GLSLA expressly disclaims any intent to do so. MCL 324.32502.

covers, and in direct contravention of the Appellee's riparian rights as established by Michigan law. App, 18a, 19a.

III. THERE IS NO SUPPORT IN FACT OR LAW FOR APPELLANT'S CLAIM THAT THEY HAVE ACQUIRED AN EASEMENT BY PRESCRIPTION, BY CUSTOM, OR BY VIRTUE OF MR. GOECKEL'S STATEMENTS WITH REGARD TO THE PROPERTY IN QUESTION.

A. The Only Claim of Prescriptive Rights Pled by Plaintiff Was Limited to the Extent to Which Plaintiff Could Put Her 15 Foot Wide Easement to Use in Addition to Mere Ingress and Egress.

A review of Plaintiff's first amended complaint reveals that the only "prescriptive" easement pled was solely with reference to the types of use she could make of her 15 foot wide easement area, in addition to ingress and egress. See Plaintiff's First Amended Complaint, Count II. App, 25a, 26a. As the Trial Court opinion made clear, the issues presented by Count II were resolved by the parties. App, 4a, 2nd paragraph. Because Plaintiff's right to access to the Goeckel property between the ordinary high water mark and the water's edge was never pled to be predicated upon the doctrine of prescription, it is being raised by Plaintiff for the first time on appeal. It is therefore not preserved for appellate review. Coates v Coates, 327 Mich 444, 447 (1950).

B. Although Plaintiff Did Plead a Right to Access Over the Goeckel's Property Between the Ordinary High Water Mark and the Water's Edge Pursuant to "Custom and Practice", Such a Claim is Not Recognized Under These Facts and Michigan Law.

Count III of Plaintiff's First Amended Complaint is the only pled basis upon which she claimed entitlement to the use of the Goeckel property between the ordinary high water mark and the water's edge. App, 26a. Paragraph 23 does allege that "under local custom and practice, members of the public have for many years walked along the shore of Lake Huron lying lakeward

of the ordinary high-water mark in the are of defendants' property, without interference by lakefront property owners."[11]

As Save Our Shoreline aptly points out in Argument III of its brief, Michigan law does not support Plaintiff's "custom and practice" claim. Du Mez v Dykstra, 257 Mich 449 (1932); Kempf v Ellixson, 69 Mich App 339 (1976).

Additionally, the irony of Plaintiff's theory in this regard is manifest. Indeed, it calls to mind the axiom "Be careful what you ask for because you just might get it". If Plaintiff's theory in this regard were accepted by this Court the result will be precisely what Plaintiff decries. Private beachfront property owners will undoubtedly cease the allowance of the occasional permissive stroll along the shoreline on their property lest they be found to have relinquished their property right of exclusive use to the water's edge.

C. Statements Made by Mr. Goeckel in His Deposition Do Not Constitute a Relinquishment of His Right to Use of the Property to the Water's Edge.

Plaintiff's argument in this regard is two-fold: (1) Mr. Goeckel allegedly admitted that the State had title to the land in question and; (2) Mr. Goeckel's past practice of allowing the occasional beachfront stroller constitutes a relinquishment of his right to exclusive use of his property to the water's edge. This second premise, of course, is not supported by Michigan law. See Argument III B.

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[11]It is significant that Plaintiff's "custom and practice" theory is not based upon her individual past practice, but upon what "members of the public" have enjoyed over the years. There is no prescriptive claim, therefore, based upon the Plaintiff's use, whatever it may have been, with regard to the land in question.

As to the Plaintiff's first premise, it is supported by neither fact nor law. As a matter of fact Mr. Goeckel made it clear in his deposition that it was his belief that he owned to the water's edge. App, 62a lines 7-24. Additionally, the question of where the Goeckel property rights end and the State's begin is a question of law with regard to which lay people are not competent to testify:

> Under MRE 701, a non-expert witness' opinion testimony is limited to those opinions and inferences which are rationally based on the witness' own perceptions. **Legal** conclusions are not included.

Temborius v Slatkin, 157 Mich App 587, 602 (1987).[12]

[12]The Tip Of The Mitt Watershed Council argues in Section 3 D of its brief that the Goeckels' claim to exclusive use and/or title to the water's edge regarding the land in question is barred by either the statute of limitations or laches. This issue is not properly before the Court. MCR 7.302(G)(4)(a) provides that unless otherwise ordered by the Court, appeals are limited to the issues raised in the application for leave to appeal. Plaintiff raised neither the statute of limitations nor laches in her application for leave to appeal. Although MCR 7.302(G)(4)(b) provides that on motion of any "**party**" for good cause, the Court may grant a request to add additional issues. No "party" has submitted a motion to this Court requesting consideration of either the statute of limitations or laches. Such a motion at this late date would surely be viewed as untimely given that briefing deadlines have expired. Additionally, with regard to the merits of these alleged defenses, Appellees would point out that their pleadings did **not** involve a quiet title claim. The counter-claim was clearly an action for trespass. App, 22a. The substantive lack of merit regarding the statute of limitations and laches claims is also adequately addressed by the brief of Amici Michigan Chamber of Commerce, et al. in Section IV of their brief.

IV. NOT ONLY DO THE GOECKELS ENJOY THE RIGHT TO EXCLUSIVE USE OF THE PROPERTY TO THE WATER'S EDGE, THEY HOLD TITLE TO THE WATER'S EDGE.

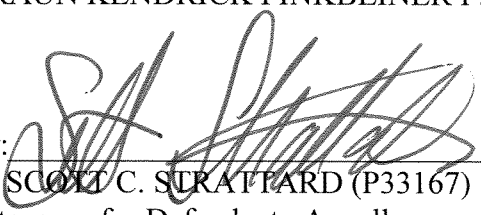
The Appellees are mindful that amici curiae do not serve as advocates for a given party's position, but merely serve to assist the Court in reaching its decision by virtue of their interests and expertise in any given area of the law. Nevertheless, in this case those amici who have filed briefs in support of the proposition that the Goeckels not only enjoy exclusive right to use, but also title, have provided very comprehensive briefs. Any attempt by the Appellees to add to the discourse on this issue would be unavoidably redundant and a waste of this Court's time and resources. Consequently, the Appellees incorporate herein and adopt the amici briefs of Michigan Chamber of Commerce, National Federal of Independent Business Legal Foundation, Michigan Banker's Association, Michigan Hotel, Motel and Resort Association, Defenders of Property Rights, Great Lakes Coalition, Inc., and Save Our Shoreline as support for their argument that they possess title to the land in question to the water's edge, wherever that edge may be from time to time.

RELIEF

It is requested that this Court affirm that portion of the Court of Appeals' opinion below that holds that the Appellees enjoy exclusive right to the use of the land in question to the water's edge. Appellees further request that this Court reverse that portion of the opinion of the Court of Appeals below that holds that the State has title in trust to the land in question, and instead hold that the Appellees have title to the land in question.

Respectfully submitted,

BRAUN KENDRICK FINKBEINER P.L.C.



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